

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the matter of)

Requests of US West Communications, Inc. for
Interconnection Cost Adjustment Mechanisms)

CC Docket No. 97-90

CCB/CPD File No. 97-12

Petition for Declaratory Ruling and Contingent
Petition for Preemption)**ORDER****Adopted: July 9, 2004****Released: July 9, 2004****NOTICE DUE: 30 days after Federal Register publication of this Order****REPLIES DUE: 45 days after Federal Register publication of this Order**

By the Chief, Pricing Policy Division:

I. INTRODUCTION

1. On February 20, 1997, Electric Lightwave, Inc., McLeodUSA Telecommunications Services, Inc., and NEXTLINK Communications, L.L.C. (Petitioners) filed a joint Petition for Declaratory Ruling and Contingent Petition for Preemption asking the Commission to declare that the monthly Interconnection Cost Adjustment Mechanism (ICAM) surcharges proposed by US West Communications, Inc. (US West) in each of the fourteen states in which it provided telecommunications services violate sections 251 and 252 of the Communications Act of 1934, as amended (Act).¹ In addition, Petitioners requested that, pursuant to section 253 of the Act, the Commission initiate proceedings to preempt any state commission action allowing US West to implement ICAM surcharges.² This order dismisses the petition without prejudice as moot.

II. BACKGROUND

2. Section 251(c) of the Act, enacted as part of the Telecommunications Act of 1996, requires incumbent local exchange carriers (LECs) to provide to requesting telecommunications carriers interconnection with their networks and nondiscriminatory access to unbundled network elements (UNEs) at rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of section 252 of the Act.³ Section 252(d)(2) of the Act defines the just and reasonable rate for interconnection and UNEs as based on the cost of providing the interconnection or UNE plus a

¹ *Requests of US West Communications, Inc. for Interconnection Cost Adjustment Mechanisms*, CC Docket No. 97-90, CCB/CPD File No. 97-12, Petition for Declaratory Ruling and Contingent Petition for Preemption (filed Feb. 20, 1997) (*Petition*). See also 47 U.S.C. §§ 251-252. US West is now known as Qwest.

² *Petition* at ii. See also 47 U.S.C. § 253.

³ 47 U.S.C. § 251(c)(2) and (3). See also Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Section 251(c) also requires incumbent LECs to offer for resale at wholesale rates any telecommunications service provided at retail. 47 U.S.C. § 251(c)(4).

reasonable profit.⁴ The Commission has defined cost for purposes of section 252(d)(2) as Total Element Long Run Incremental Cost (TELRIC). The TELRIC pricing standard, initially established by the Commission in the *Local Competition Order* and incorporated in the Commission's rules in 1996, has been subject to lengthy legal challenges, but ultimately was upheld by the Supreme Court.⁵

3. When Petitioners filed their request for declaratory ruling and contingent preemption in February 1997, US West had filed with the state commissions in each of the fourteen states in its service territory requests for authority to implement monthly ICAM surcharges to recover from either its competitive LEC or end user customers "extraordinary" costs incurred to "transform" its network to implement section 251(c) of the Act.⁶ These costs included start-up expenses to establish service centers to process competitive LEC orders, costs of software changes to allow for service assurance, capacity provisioning, billing and service delivery, and costs to expand network capacity to accommodate anticipated competitive LEC traffic demands.⁷ In seeking declaratory and contingent preemption relief to prevent imposition of these ICAM surcharges, Petitioners claimed that section 252(d) of the Act and the *Local Competition Order* prohibit recovery of such costs through charges for interconnection and UNEs, and that such charges constituted a barrier for new market entrants subject to preemption under section 253.⁸ US West responded that the Commission's jurisdiction to determine the validity or appropriateness of the ICAM surcharges was questionable, that the matter was best left to the state commissions, and that, because none of the fourteen state commissions had yet approved any ICAM surcharges, a preemption order would be premature.⁹

4. Even before completion of the lengthy legal battle to determine the legality of the Commission's TELRIC pricing standard, US West abandoned its effort to recover through ICAM any extraordinary costs associated with implementation of section 251(c) of the Act. As US West's successor company, Qwest, states in a recent letter to the Commission:

At the end of 1997, Qwest made a decision to stop seeking recovery of interconnection costs through the ICAM. Since that time, Qwest has sought recovery of these costs through either a separate unbundled network element (i.e. OSS) [Operations Support System] or a local interconnection service charge.¹⁰

Qwest further states, "Qwest is no longer advocating the use of this [ICAM] mechanism for recovering

⁴ 47 U.S.C. § 252(d)(2).

⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499, 15844-56, paras. 672-703 (1996) (*Local Competition Order*); 47 C.F.R. §§ 51.501-515. See also *Verizon Communications, Inc v. FCC*, 535 U.S. 467 (2002).

⁶ *Petition* at i, 2.

⁷ *Id.* at 3.

⁸ *Id.* at 4, 6-9, 10-12.

⁹ *Requests of US West Communications, Inc. for Interconnection Cost Adjustment Mechanisms*, CC Docket No. 97-90, CCB/CPD File No. 97-12, Reply Comments of US West, Inc. at 7-8 (filed Apr. 28, 1997). At the time of US West's response, the Commission's authority to establish a national pricing standard to recover the costs of providing interconnection and UNEs was subject to challenge in the Eighth Circuit Court of Appeals, which eventually ruled that the Commission lacked such authority. See *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997). Ultimately the Supreme Court upheld the Commission's authority to establish a national pricing standard, and the TELRIC pricing rules. See *Verizon*, *supra*.

¹⁰ Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest, to Tamara Preiss, Chief, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission (filed Apr. 27, 2004).

the start-up costs associated with implementing the 1996 Telecommunications Act The ICAM was filed in several states during 1997 but was never adopted by a state commission.”¹¹

5. Given that Qwest decided not to pursue recovery of interconnection costs through the ICAM and that no state ever adopted the proposal, we fail to see that any dispute regarding the legality of the ICAM continues to exist between petitioners and Qwest. Therefore, we dismiss the petition without prejudice as moot, unless any interested party notifies us within 30 days of publication of this order in the Federal Register that there is still a genuine dispute that remains to be resolved. Should the Commission receive such a notice, it will, as appropriate, seek public comment and resolve any remaining controversy.

III. PROCEDURAL MATTERS

6. Interested parties may file the notice mentioned in the preceding paragraph no later than **30 days after this Order appears in the Federal Register**. Oppositions or responses to any notice may be filed no later than **45 days after this Order appears in the Federal Register**. All pleadings may be filed using the Commission’s Electronic Comment Filing System (ECFS) or by filing paper copies.¹² Pleadings filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/cgb/ecfs/>. Generally, only one copy of an electronic submission must be filed.¹³ In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number, which in this proceeding is CC Docket No. 97-90. Parties may also submit an electronic pleading by Internet e-mail. To get filing instructions for e-mail pleadings, parties should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, “get form.” A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing.¹⁴

7. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail).

8. The Commission’s contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission’s Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 2002.

-The filing hours at this location are 8:00 a.m. to 7:00 p.m.

-All hand deliveries must be held together with rubber bands or fasteners.

-Any envelopes must be disposed of before entering the building.

-Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

-U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554.

¹¹ *Id.*

¹² See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322, 11326, para. 8 (1998).

¹³ If multiple docket or rulemaking numbers appear in the caption of a proceeding, however, parties must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption.

¹⁴ If more than one docket or rulemaking number appear in the caption of a proceeding, parties must submit two additional copies for each additional docket or rulemaking number.

-All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

9. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street S.W., CY-B402, Washington, D.C. 20554 (telephone 1-800-378-3160, email www.bcpiweb.com).

10. Parties are strongly encouraged to file pleadings electronically using the Commission's ECFS. Parties are also requested to send a courtesy copy of their pleadings via email to julie.saulnier@fcc.gov. If parties file paper copies, parties are requested to send two (2) copies of the pleadings to Chief, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, 445 12th Street, SW, Room 5-A221, Washington, D.C. 20554.

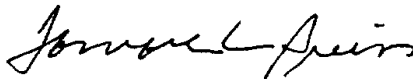
11. Documents in CC Docket No. 97-90 are available for public inspection and copying during business hours at the Federal Communications Commission Reference Information Center, Portals II, 445 12th St. SW, Room CY-A257, Washington, DC 20554, and will be placed on the Commission's Internet site. The documents may also be purchased from Best Copy and Printing, Inc., telephone 1-800-378-3160.

12. *Ex Parte Requirements.* This proceeding will be governed by "permit-but-disclose" *ex parte* procedures that are applicable to non-restricted proceedings under section 1.1206 of the Commission's rules.¹⁵ Parties making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required.¹⁶ Other rules pertaining to oral and written presentations are set forth in section 1.1206(b). Interested parties are to file any written *ex parte* presentations in this proceeding with the Commission's Secretary, Marlene H. Dortch, 445 12th Street, S.W., TW-B204, Washington, D.C. 20554, and serve with three copies: Pricing Policy Division, Wireline Competition Bureau, 445 12th Street, S.W., Room 5-A452, Washington, D.C. 20554, Attn: Julie Saulnier. Parties shall also serve with one copy: Best Copy and Printing, Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, (202) 863-2893.

IV. ORDERING CLAUSE

13. Accordingly, it is ORDERED that the Petition for Declaratory Ruling and Contingent Petition for Preemption of Electric Lightwave, Inc., McLeodUSA Telecommunications Services, Inc., and NEXTLINK Communications, L.L.C. IS DISMISSED without prejudice unless the Commission receives notice from any interested party within THIRTY days of publication of this order in the Federal Register that a genuine dispute remains to be resolved.

FEDERAL COMMUNICATIONS COMMISSION



Tamara L. Preiss
Chief, Pricing Policy Division
Wireline Competition Bureau

¹⁵ 47 C.F.R. § 1.1206.

¹⁶ See 47 C.F.R. § 1.1206(b)(2).